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ACCORD AND SATISFACTION BY OPERATION OF LAW.—The American courts in the past decade have generally followed the leading New York case of *Fuller v. Kemp*<sup>1</sup> in holding that when a sum of money, tendered by a debtor to his creditor on express condition that it be received in full satisfaction of an unliquidated or disputed claim, is retained by the debtor, an accord and satisfaction results, even though the creditor immediately protests that the sum is not taken in full satisfaction, but only on account. The New York Supreme Court in two recent cases has had occasion again to pass upon the point. *Mack v. Miller*, 84 N. Y. Supp. 440; *Laroe v. Sugar Loaf Dairy Co.*, 84 N. Y. Supp. 609. In the former case the court declared that the condition upon which the check was tendered was not made sufficiently clear to the creditor to bring the case within the rule, while in the latter, the facts being similar to those of *Fuller v. Kemp*, the court found an accord and satisfaction. The same rule was applied in a recent Mississippi decision. *Cooper v. Yazoo, etc.*, R. R. Co., 35 So. Rep. 162.

It is difficult to see upon what legal principle the result reached by these cases can be supported. An accord is a species of contract, and requires mutual assent,—an offer on the one side and an acceptance on the other. The courts agree to this, but hold that in this class of cases an acceptance must be conclusively presumed from the act of the creditor. It is said that the creditor's action in retaining the sum tendered is open to but one inference, namely, that the condition has been accepted. This is, however, in a sense, a misstatement of the situation. It is not true that the creditor has no alternative but to accept the condition or return the sum tendered. He may take a third course, attempt to apply the sum on account, and thus lay himself open to an action for conversion. Though the property of the debtor is lawfully in his hands, the creditor may not, without the debtor's assent, apply it in payment of the debt, and the retention of the property after demand is an actionable conversion.<sup>2</sup> The damages ordinarily recoverable in trover for conversion are the value of the property converted, but under the American rule, where the conversion operates as an accord and satisfaction, the actual damages suffered by the creditor as a result of his act of conversion are likely to be very much greater. In one New York case<sup>3</sup> the creditor lost by retaining a check sent him in full satisfaction four-fifths of his claim, the whole of which a jury stood ready to give him.

Of course it may well be urged, on the other hand, that the courts have been led to adopt this rule by their disposition to favor offers of compromise, and perhaps more particularly by their feeling that the remedy in a case of conversion is wholly inadequate as a means of doing justice to the debtor. Still it cannot be denied that the rule of *Fuller v. Kemp* affords the opportunity to a sharp business man frequently to avoid his just debts by inducing his unwary creditors to retain a check for a small amount sent upon condition that it be payment in full. It seems a matter for regret, therefore, that most American courts have not followed those of England<sup>4</sup> and Massachusetts<sup>5</sup> in holding in all such cases that whether or not certain acts of a creditor show the acceptance of an offer of a contract of accord is a question of fact for a jury.

<sup>1</sup> 138 N. Y. 231.

<sup>2</sup> *Precker v. London*, 73 N. Y. Supp. 145.

<sup>3</sup> *Nassoiv v. Tomlinson*, 148 N. Y. 326.

<sup>4</sup> *Day v. McLea*, 22 Q. B. D. 610.

<sup>5</sup> *Tompkins v. Hill*, 145 Mass. 379.